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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

No. 72-644

D. C. TRANSIT SYSTEM, INC.,

Petitioner,

v.

WASHINGTON METROPOLITAN AREA TRANSIT COMMISSION,

Respondent,

and

DISTRICT OF COLUMBIA COUNCIL, BLACK UNITED FRONT and DIANA K. POWELL,

Intervenors.

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

I.

ISSUE PRESENTED

Does a public utility, which has been given substantial exclusive operating privileges in exchange for an assumption of responsibility to provide adequate levels of

service, have the right to exact increased fares for its services in order to avoid losses, even though the utility is managed in such a way as to preclude the rendition of adequate services? Or may a regulatory agency require the utility to correct management deficiencies to assure that the public receives full services in return for increased fares?

II.

STATUTES INVOLVED

Petitioner has not made reference to all of the relevant statutory provisions involved. He failed to cite that section of the Washington Metropolitan Area Transit Regulation Compact, Public Law 86-794, 74 Stat. 1031 (1960), D. C. Code 1 §1410 (1967 ed.) which sets out the criteria for establishment of just and reasonable fares:

Article XII, Section 6(a)(3)

"(3) In the exercise of its power to prescribe just and reasonable fares and regulations and practices relating thereto, the Commission shall give due consideration, among other factors, to the inherent advantages of transportation by such carriers; to the effect of rates upon the movement of traffic by the carrier or carriers for which the rates are prescribed; to the need, in the public interest, of adequate and efficient transportation service by such carriers at the lowest cost consistent with the furnishing of such service; and to the need of revenues sufficient to enable such carriers, under honest, economical, and efficient management, to provide such service."

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III
STATEMENT OF THE CASE

In July 1970, the Washington Metropolitan Area Transit Commission authorized an increase in the basic District of Columbia bus fare for D. C. Transit System, Inc. (Transit) from 32 cents to 40 cents, an increase of 25 percent.[1] Commensurate increases were authorized for Transit's Maryland intrastate and interstate services.

In authorizing a fare increase, the Commission sought to insure that new revenues collected by Transit would be used by Transit's management for operating necessities. Experience had taught the Commission that fare increases were too often justified on the basis of anticipated costs for particular future needs, but after the fare increase became effective, those needs were not met. That had repeatedly been the experience with Transit's program for the purchase of new buses. Although the Transit Commission for a number of years had required that Transit replace a certain portion of its fleet with new vehicles each year, and depreciation allowances for ratemaking purposes had been geared to the assumption that those new buses would in fact be purchased, compliance with the bus purchase requirement had been only sporadic. No new buses had been purchased by Transit since 1968. Thus, in the 1970 rate case, the Commission felt it necessary to take the unusual step of ordering Transit to place $620,000 of its profit in an escrow account to be used for the downpayment on the 85 new buses it was to purchase in the coming year.[2] But

[1] *D. C. Transit System, Inc.* (WMATC Order No. 1052) 85 P.U.R. 3d 1 (1970), *D. C. Transit System, Inc.* (WMATC Order No. 1057) 85 P.U.R. 3d 33 (1970).

[2] *D. C. Transit System, Inc.* (WMATC Order No. 1052) 85 P.U.R. 3d 12-13, 17, 29-30 (1970).

even after that extraordinary requirement had been imposed to insure that money would be available for bus purchases, and actually spent for buses, the buses were never even ordered.

In December 1972, the Commission, having failed to receive a full and satisfactory informal explanation of why the buses had not been purchased, ordered Transit to provide a formal explanation.[3] In its response on December 29, 1971, Transit stated that it had been unable to secure the necessary financing for purchase of new buses even with a high 20-percent downpayment. Concerned "with the implications of this situation wherein the major mass transit operator in the Washington area is unable to continue a program of replenishment of its bus fleet . . . [and] particularly concerned that this should occur in a period following a substantial increase in fares,"[4] the Commission directed its staff to employ the services of a qualified financial analyst to perform a complete analysis of Transit's financial situation to determine exactly what steps Transit needed to take to develop adequate cash flow and financial stability to allow it to continue to provide mass transit service at an adequate level. Touche, Ross & Company, a nationally known and highly reputable accounting firm, was hired to perform the analysis which was done by one of its partners, Pasquale Loconto.

In the meantime, Transit had filed an application for another increase in its basic fare, from 40 cents to 50 cents. When the Loconto analysis was complete and his

[3]WMATC Order No. 1188, issued December 16, 1971, Respondent's Appendix 1a.

[4]WMATC Order No. 1199, issued February 10, 1972, Respondent's Appendix 4a.

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report submitted to the Commission, the staff offered the report as evidence, and Mr. Loconto as a staff witness, as an appropriate matter for Commission consideration in the pending rate matter.

The Loconto report showed in detail that the reason for Transit's inability to secure financing for buses was that Transit's overall financial structure was extremely risky.[5] Loconto employed a number of analytic measures to test the soundness of Transit's financial structure and by each measure serious financial imbalance was confirmed.[6] Loconto concluded that even if Transit were allowed a new fare that would permit it to earn a reasonable return, Transit would not be able to attain any measure of financial stability without also infusing additional funds into the company from sources other than the farebox.

Specifically, using estimates which had been presented in the rate case, Loconto concluded that even if in the first year a 50-cent fare would provide $3.5 million in new revenue, the financial condition of Transit would worsen. If the company were to move toward financial stability, he counselled that in addition to increased farebox revenue the company would need, in the first year, $8.5 million from sources other than the farebox. He noted funds could come from sale of non-operating

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[5]See summary of Loconto's analysis in Order No. 1216, Petitioner's Appendix, A-67-72.

[6]As noted by the Court below, a comparison with other transit companies showed Transit to have the least stable structure by all indices, and to be dependent on increasing, dangerously high levels of short-term debt. *D.C. Transit System, Inc. v. WMATC* (CADC No. 72-1555, decided July 28, 1972) (not yet reported) Petitioner's Appendix, p. A-9 note 35.

properties or calling outstanding interest-free loans to corporate affiliates, as well as increasing equity capital. He recommended further infusion of funds from sources other than the farebox in ensuing years.

At no time did Transit dispute Loconto's analysis, nor in any manner attempt to rebut it. At no time did Transit even assert, much less prove, that the infusion-of-funds remedy was either impossible, or for any other reason, inappropriate.

Thus, the Commission had before it undisputed evidence of a severe imbalance in the financial structure of Transit, which a fare increase alone could not substantially mitigate, and a detailed recommendation for correction which was unchallenged.

The Commission also had before it a record of the results of inadequate financing. All of the major indicators showed deteriorating transit service with greater deterioration to come. Not only had Transit been unable to purchase needed new buses in the past but it offered no hope or assurance that it could do so in the future even with an increased fare. Fewer drivers, fewer bus mechanics, and fewer bus cleaners than were necessary to provide the service Transit was obligated to render were being hired, trained, and retained by the company.[7]

It was on the basis of that record that the Commission was required to determine the just and reasonable fare.

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[7]WMATC Order No. 1216, Petitioner's Appendix A-74; WMATC Order No. 1219, Petitioner's Appendix A-95, 96 note 10.

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In setting fares, the Commission is required by statute[8] to give consideration to a number of factors, including the carrier's need for revenues to enable it to provide efficient transportation services under honest, economical, and efficient management.[9] Further, the Commission is required, under guidelines set out by the United States Court of Appeals for the District of Columbia, to establish fares that will provide not merely the form but the substance of financial stability to the regulated enterprise.[10] On the question of economic and efficient management, the Commission found that management practices had resulted in a financial structuring that precluded the company from buying buses or otherwise providing an adequate level of service, and was clearly inefficient and uneconomical management.[11] It also found that raising the fare would not by itself ensure financial stability.

In those circumstances, the Commission concluded that if it were to raise the fare and nothing more, it would be requiring the bus riding public to make its contribution to the viability of the transit system with no commitment from Transit's management that viability would be restored and adequate service rendered. The Commission asserted that the obligation of the ratepayer to the company is not a unilateral one, but has its

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[8]Washington Metropolitan Area Transit Regulation Compact, Public Law 86-794, 74 Stat. 1031 (1960), D.C. Code 1§ 1410 (1967 Ed) Art. XII Sec. 6(a)(3).

[9]id.

[10]*D. C. Transit System Inc. v. Washington Metropolitan Area Transit Commission*, 35 F.2d 753, 778 (CADC 1965).

[11]WMATC Order No. 1216, Petitioner's Appendix A-74.

reciprocal in the company's obligation to provide service in return for reasonable fares paid.

Thus, the Commission determined that if it were to allow an increase in the fare, it would, as a condition to an increase, require Transit to correct the financial imbalance that Loconto had identified. But the Commission had no confidence that even if the company were ordered to produce the needed new funds, it would do so. The Commission had been over that ground before with this company. Frequently before, in fact in every Transit rate case which had ever been before the Commission, over a period of nine years, the Commission had pointed to the problem of financial imbalance and had warned the company that some corrective measure involving production of funds from a source other than the farebox would be necessary.[12] Those warnings had been totally ignored by Transit. This time, therefore, the Commission determined that the only assurance it would have that the imbalance would be corrected, so that bus purchases and bus services would be restored to an adequate level, would be to require Transit to correct, or at least begin to correct, the imbalance before any new farebox revenues would be available.

The Commission's disposition of the matter, then, was to order Transit to produce $6.4 million, specifically for the purpose of purchasing new buses and decreasing its debt along the lines of the Loconto recommendations, as a pre-condition to any further fare increase.

Transit's application for increased fares and the supporting material had been filed in late December

[12]See WMATC Order No. 1219, footnote 9, Petitioner's appendix A-95, wherein Commission's prior orders are summarized.

1971. In May 1972, when its order disposing of the case and establishing the precondition was issued, the Commission concluded that if the record in the rate case were held open beyond a further 90-day period, some of the data presented would be stale and useless for proper ratemaking determinations. Therefore, the Commission said that it would leave the record in the rate proceeding open for a 90-day period beyond May 19, 1972, and if Transit were to produce the necessary funds in that period, the Commission could proceed then to adjust the fare on the basis of the record it had before it. If Transit took more than that ninety days to produce the necessary funds, then the record in the rate case would be closed and a new record would have to be developed in order to provide a proper basis for any fare adjustment. The Commission did not, as Transit asserts, require Transit to produce $6.4 million in ninety days as a condition to a fare increase. It required that the funds be produced within ninety days as a condition to keeping that particular record open.[13]

Six days after the issuance of the Commission's order denying the fare increase, the company served notice on the Commission that it intended to charge the proposed higher fare in spite of the Commission's order specifically denying the authority to do so.[14] This necessitated a request by the Commission to the United States District

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[13]This is all made perfectly clear in WMATC Order No. 1216-B, issued May 25, 1972. Petitioner's Appendix A-83. See also Judge Robinson's opinion below, Petitioner's Appendix A-42-44.

[14]Letter of S. O. Hatfield, Executive Vice President, D.C. Transit System, Inc. to Washington Metropolitan Area Transit Commission, dated May 25, 1972, Respondent's Appendix 7a.

Court to issue an injunction against the unlawful act of Transit. The injunction was granted.[15] Then, following the prescribed statutory procedures for court review of commission orders, the company petitioned the Commission for reconsideration, which petition was duly denied.[16] The matter was appealed to the United States Court of Appeals for the District of Columbia Circuit which affirmed the Commission's orders on July 28, 1972.

Meanwhile, the 90-day period (to expire on August 17, 1972) during which the Commission would keep the rate case docket open to allow Transit time to produce the additional funds, was running. The expiration date came and went without any further indication from the company as to whether it intended to attempt to produce those funds or not. Transit asserts in its petition to this Court that "subsequent events have shown" that Transit could not have produced the funds required by the Commission order.[17] The record, in fact, shows no such thing. The record shows only that the recommendation for production of new funds was made by Loconto in April, that the Commission adopted his recommendation in May, and that no funds were produced then, or in August, or ever. Whether they were not produced because the company could not produce them, or simply would not, is a matter of conjecture, not a matter of record.

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[15] *Washington Metropolitan Area Transit Commission v. D.C. Transit System, Inc.* (D.D.C. C.A. No. 1061-72, decided June 1, 1972 (not yet reported).

[16] WMATC Order No. 1219, Petitioner's Appendix A-85.

[17] Petitioner's Petition, p. 7, footnote*.

IV

REASONS FOR DENYING THE WRIT

The record in this case is over 4,000 pages long. Essentially, petitioner asks this Court to review again that record and to conclude that not only the Commission, but the Court of Appeals, erred in evaluation of the record. Petitioner asks for this extraordinary review notwithstanding the meticulous attention which the Court of Appeals gave in its fifty-nine page Opinion to each of the contentions which petitioner seeks to assert here. While, as we proceed to show, the Court of Appeals correctly decided this case, certiorari would be inappropriate even if there was an arguable basis of error presented by the petition. This case, which arises under a compact applicable only to mass surface transportation in the District of Columbia area, obviously involves a matter of local concern of the type to which this Court has historically deferred to the local courts in the District of Columbia. For this reason, and because this case will become moot long before it can be briefed and argued, certiorari should be denied.

While we place principal reliance on the careful opinion of the Court of Appeals, we briefly set forth the considerations which warrant denial of the petition.

A. THE ISSUES AS FRAMED BY TRANSIT ARE TOO INSUBSTANTIAL FOR SUPREME COURT REVIEW.

The issues, as presented by Transit, asserting denial of due process and violation of orderly judicial process, when viewed against the background of the solid record of financial instability resulting from management decisions, the history of this company's non-compliance

with Commission orders, and its failure to provide adequate services, do not present any basis for Supreme Court review of this case. Transit's issues are on their face without substance.

For example, the issue of the sufficiency of the evidence of uneconomic and inefficient management, even if that were the kind of issue this Court should spend time on, is no issue at all. There is strong evidence in this case, unrebutted by Transit, that Transit's financing has been inappropriate and totally inadequate for a transit operation in a major city. The record shows the results of that financial inadequacy—failing service and an inadequately maintained, aging bus fleet. The evidence could not be better to show inefficient and uneconomic Transit management.

Transit's argument that the Court of Appeals improperly failed to consider whether the Commission finding of uneconomical and inefficient management was supported by the record,[18] ignores the fact that the Court addressed that specific issue and sustained the Commission finding (Petitioner's Appendix, A-33-36). The Court of Appeals recognized that the Commission's findings of inefficient and uneconomical management "were based principally on analysis presented in the Loconto report" which it had discussed at length earlier in its opinion (Petitioner's Appendix A-6-12). Clearly, the Court was aware of the contents of that report, and just as clearly it deemed the Commission's findings based on the report sufficient to support a further finding of uneconomical and inefficient management.

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[18] Petition, pp. 26-27.

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Transit's attempt to make an issue from its own whole-cloth accusation that the Commission was trying to force Transit into public ownership as the true motive for its action in denying the fare increase, is, at the very best, frivolous.

Finally, with respect to Transit's assertion that the denial of the fare increase constitutes confiscation without due process of law, it is clear that Transit's own policies are the cause of any losses. Deliberate management policies caused the deterioration of the transit system and forced the Commission, in the furtherance of its statutory duty, to deny the imposition of increased fares until the company met its obligations to the public. As the Commission made clear, as soon as the company corrected its deficiencies, the Commission was prepared to adjust fares to an appropriate level.[19]

B. THE ONLY ISSUE IS TRANSIT'S UNMET RESPONSIBILITY TO THE BUS RIDING PUBLIC AND WHETHER THE COMMISSION'S RESPONSE WAS LAWFUL.

The real issue in this case, as the Commission conceives it, as we read the Court of Appeals view of it, is as follows:

> Does a public utility, which has been given substantial exclusive operating privileges in exchange for an assumption of responsibility to provide adequate levels of service, have the right to exact increased fares for its services in order to avoid losses, even though the utility is managed in such a way as to preclude the rendition of adequate

[19] WMATC Order No. 1216, Petitioner's Appendix, A-76; WMATC Order No. 1219, Petitioner's Appendix A-87.

services? Or may a regulatory agency require the utility to correct management deficiencies to assure that the public receives full services in return for increased fares?

If the Commission must require the public to pay increased fares no matter what management deficiencies are found and no matter how those deficiencies affect the level of service to the public, then the Commission did indeed err. But we do not believe that the Compact imposes such a narrow regulatory requirement nor can the Constitution be read to do so. The case law which we treated in detail in Order No. 1219[20] certainly does not support that proposition.

If Transit's view of the law were valid, the Commission could not function in any true regulatory sense. As the Court of Appeals observed:

> "... If Transit is correct, the Commission is powerless to sanction corrective measures by deferring further consideration of a fare increase. If Transit is correct, it may disregard its public responsibilities at will—as the Commission found that it has frequently done [footnote omitted]—and yet insist that the public respond to its demands for higher fares. We cannot accept that position. We do not believe the Constitution left the Commission impotent to deal with the situation confronting it in a sensible manner." [21]

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[20] Petitioner's Appendix, A-85-104.

[21] Petitioner's Appendix, A-52. See *Smyth v. Ames* 169 U.S. 466, 545-47 (1897); *D.C. Transit System, Inc. v. Washington Metropolitan Area Transit Commission* 350 F.2d 753, 766 (CADC 1965).

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C. THIS CASE WILL SHORTLY BECOME MOOT.

Public Law 92-517, effective on October 21, 1972, authorizes the Washington Metropolitan Area Transit Authority to assume control of the four major regular route bus operations in the Washington Metropolitan area, including the largest, D. C. Transit System, Inc. It is the Transit Authority's public position that it intends to assume the operation of this company by January 1, 1973, and it has published the schedule under which it intends to accomplish that takeover. Therefore, by about the first of the year, the services and the fares at issue here will no longer be provided by Transit.

The relief that Transit seeks in this case is a remand to the Court of Appeals.

If that remand were made, and if then the Court of Appeals were to reverse itself and find the Commission erred in not raising Transit's fare, the Court of Appeals could not calculate what that fare should be. Therefore, a further remand to the Commission would be necessary, and further Commission proceedings, before Transit could have any relief. Even then a new rate could be set only prospectively, with no possibility of any retrospective relief. Thus, if Transit were not operating these regular-route services at the time the Commission would complete its work, this Court's ruling would be pointless in terms of relief to Petitioner.

CONCLUSION

The petition should be denied.

Respectfully submitted,

FRANK F. FLEGAL
Counsel for Respondent
Washington Metropolitan
Area Transit Commission
1625 I Street, N. W.
Washington, D. C. 20006
(737-6711)

November 24, 1972

APPENDIX

WASHINGTON METROPOLITAN AREA TRANSIT COMMISSION

WASHINGTON, D.C.

ORDER NO. 1188

IN THE MATTER OF : Served December 16, 1971
D.C. Transit System, Inc.)
Bus Purchase Program.)

In Order No. 1052, issued June 26, 1970, we ordered D. C. Transit System, Inc. to escrow $619,998 in six equal installments beginning September 1970, to provide funds for down payments on the purchase of 85 buses. To date those buses have not been purchased.

According to company officials, commercial financing for the purchase of 85 buses is, and has been since issuance of Order No. 1052, unavailable. Further, it appears that government capital loan financing, which the company had sought through the Washington Metropolitan Area Transit Authority, will not be forthcoming. We are interested in knowing, pursuant to our regulatory responsibilities, the underlying causes of D. C. Transit's inability to secure such financing and to examine the full implications of that situation. Therefore, we will undertake a formal investigation of the failure of the company to purchase buses and the resulting implications.

THEREFORE, IT IS ORDERED that D. C. Transit System, Inc. shall submit, in writing, within fourteen (14) days of the issuance of this order, a full explanation of its failure to purchase buses as required by Order No. 1052, with appropriate documentation in support thereof.

BY DIRECTION OF THE COMMISSION
/s/
JEREMIAH C. WATERMAN
Chairman

WASHINGTON METROPOLITAN AREA
TRANSIT COMMISSION

WASHINGTON, D. C.

ORDER NO. 1199

IN THE MATTER OF: Served February 10, 1972
D. C. Transit System,)
Inc., Bus Purchase)
Program.)

In Order No. 1052, issued June 26, 1970, we ordered D. C. Transit System, Inc. (Transit) to escrow funds to provide down payments for the purchase of 85 buses. As of December 16, 1971, those buses had not been ordered, and we issued Order No. 1188 instituting a formal investigation of the company's failure to acquire the buses. As a first step, we ordered Transit to submit, in writing, a full explanation of its failure to purchase buses as required by Order No. 1052 with documentation to support that explanation.

On December 29, 1971, Transit submitted a letter in which it stated that it had been unable to secure bus-purchase financing through the normal commercial channels and had been unable to secure the sponsorship of the Washington Metropolitan Area Transit Authority for a loan for the purchase of the new buses. The reason for its inability to secure commercial financing, Transit asserts, is that actual revenues have fallen short of those anticipated by Order No. 1052.

Transit says that it "has been advised that when and at such time as its cash flow position is such that the financiers can readily determine that the company is in a

position to meet its financial commitments, they would be more than willing to discuss the financing of new equipment."

We are concerned with the implications of this situation wherein the major mass transit operator in the Washington area is unable to continue a program of replenishment of its bus fleet. We are particularly concerned that this should occur in the period immediately following a substantial increase in fares. Therefore, we will direct our staff to secure the services of a qualified financial consultant to advise what financial steps should be taken by the company management to allow this company to develop adequate cash flow and financial stability, which in turn will permit the company to continue to purchase rolling stock and other items essential in the conduct of a mass transit business. The expenses of this investigation will be assessed against the company pursuant to Article XII, Section 19(a) of the Compact.

THEREFORE, IT IS ORDERED:

1. That the staff hire a consultant to perform a financial analysis of D. C. Transit System, Inc. and to make recommendations as to the financing required to give Transit necessary financial stability.

2. That D. C. Transit System, Inc., be, and it is hereby, assessed $12,000 which it is directed to deposit in the name and to the credit of the Washington Metropolitan Area Transit Commission in the American Security and

Trust Company, 1612 K Street, N. W., Washington, D. C., on or before February 24, 1972.

BY DIRECTION OF THE COMMISSION

/s/
JEREMIAH C. WATERMAN
Chairman

SULLIVAN, Commissioner, not participating.

WASHINGTON METROPOLITAN AREA TRANSIT COMMISSION

WASHINGTON, D. C.

ORDER NO. 1199A

IN THE MATTER OF: Served February 24, 1972
D. C. Transit System, Inc.)
Bus Purchase Program.)

Order No. 1199, issued February 10, 1972, erroneously noted Sullivan, Commissioner, as not participating. It should have listed him as dissenting.

THEREFORE, IT IS ORDERED that Order No. 1199 be corrected to list Sullivan, Commissioner, as dissenting, rather than as not participating.

FOR THE COMMISSION:

/s/
DOUGLAS N. SCHNEIDER, JR.
Executive Director

D. C. TRANSIT SYSTEM, INC.
2251 26th Street, N. E.
Washington, D. C. 20018

Samuel O. Hatfield
Executive Vice President

May 25, 1972

By Hand
Washington Metropolitan Area
Transit Commission
1625 I Street, N. W.
Suite 316
Washington, D. C. 20006

Re: Application No. 752
Docket No. 241

Dear Sir:

This is to notify you that it is our view that on its face Order No. 1216 is inconsistent with and in violation of the Compact and hence illegal and invalid and that, accordingly, Section 6 of Article XII, Title II of the Compact requires us to put our proposed new fares into effect at the end of the statutory suspension period.

Accordingly, at 12:01 a.m. on Saturday morning, May 27, 1972, it is our present intention to put into effect the fares described in WMATC Tariff No. 41R and in the revised pages of WMATC Tariff No. 45 as attached to our application in the above matter, unless previously enjoined by a court of competent jurisdiction.

Very truly yours,

/s/
S. O. Hatfield
Executive Vice President